Editor's note: 91 I.D. 14; Appealed -- aff'd, Civ.No. 85-646-LE (D.Or. July 9, 1987), 676 F. Supp. 1047; aff'd in part, rev'd in part, remanded, No. 87-4096 (9th Cir., June 7, 1989 as amended June 30 and July 31, 1989); 876 F.2d 1419

STATE OF OREGON ET AL., I

IBLA 73-363 Decided January 10, 1984

Appeals from a decision of the Oregon State Office, Bureau of Land Management, rejecting applications for school indemnity lands. OR 3162, OR 3163, OR 3164, and OR 3737.

Affirmed in part, reversed in part, and remanded.

1. Act of June 4, 1987 -- Exchanges of Land: Forest Exchanges -- State Exchanges: Generally

   Where a deed embracing certain base lands is tendered to the United States in an application for an exchange under the Forest Lieu Exchange Act, Act of June 4, 1897, 30 Stat. 31, which title is based on a deed issued for state school lands to a fictitious individual, such deed vests no title in the United States. Where, however, the state deed is issued to a real person, even though it may have been fraudulently obtained from the state, acceptance by the United States of the exchange application is sufficient to vest title in the United States to the base property, even though that title might be subject to defeasance in a proper proceeding.

2. Act of June 4, 1897 -- Exchanges of Land: Forest Exchanges -- State Exchanges: Generally

   Where the United States had accepted an application for a forest lieu exchange under the provisions of the Act of June 4, 1897, 30 Stat. 31, title to the base property vested in the United States. Such title was not divested by either the subsequent refusal of the

United States to complete the exchange or by the acquisition of the selection rights emanating from the acceptance of the application by a third-party which had been defrauded of the base lands through the actions of the original applicant.

3. Act of June 4, 1897 -- Exchanges of Land: Forest Exchanges -- State Exchanges: Generally

Where the United States had accepted an application for a forest lieu exchange under the provisions of the Act of June 4, 1897, 30 Stat. 31, which application was based on base lands fraudulently secured from a state, and the state subsequently obtained a quitclaim from the applicant of all his interest in the lands, the state did not regain title to the base lands but rather was vested with all selection rights which had properly appertained to the exchange application.

4. Act of June 4, 1897 -- Estoppel -- Exchanges of Land: Forest Exchanges -- State Exchanges: Generally

Where the record establishes that, but for the actions of the Department in improperly approving an exchange, a state would have properly exercised its exchange rights pursuant to applicable law, the Department will be estopped from subsequently asserting the exchange was improper where, as here, it would no longer be possible for the state to exercise its exchange rights.

5. Act of June 4, 1897 -- Exchanges of Land: Forest Exchanges -- State Exchanges: Generally

Under the United States Supreme Court's decision in Wyoming v. United States, 255 U.S. 489 (1921), an application for a forest lieu exchange was accepted by the filing of a proper exchange and the acceptability of an exchange was to be judged with reference to the facts existing at the time of filing. The actual acceptance of an exchange application, however, even if based on a misapprehension of the facts, vested title to the offered lands in the United States.

6. Act of June 4, 1897 -- Exchanges of Land: Forest Exchanges -- Res Judicata -- State Exchanges: Generally

The classification of land as Supplement A, B, or C, by the Oregon Supreme Court in State v. Hyde, 88 Or. 1, 169 P. 757 (1918), is not binding on the United States as to the factual predicates thereof, particularly as the United States was not a party to the case.

7. Act of June 4, 1897 -- Exchanges of Land: Forest Exchanges -- State Exchanges: Generally

   When a state obtained a quitclaim deed from a forest lieu applicant whose application had been accepted by the United States, the state merely acquired the same rights to complete the selection which were possessed by the original applicant. Where the state failed to record this forest lieu selection right under the Act of Aug. 5, 1955, 69 Stat. 534, or tender such right for payment under the Act of July 6, 1960, 74 Stat. 334, all rights flowing from the forest lieu selection right to either complete an exchange or have the base property reconveyed terminated.

8. Act of June 4, 1897 -- Exchanges of Land: Forest Exchanges -- State Exchanges: Generally -- Title: Generally

   While it is a general rule that adverse possession does not run against a state, this rule does not apply as against the United States. Where the United States has maintained open and notorious possession of certain parcels of land for over 80 years, the United States has acquired title to those parcels through adverse possession even though the record title holder was a state.

APPEARANCES: Michael Reynolds, Esq., and Peter S. Herman, Esq., Department of Justice, State of Oregon; Robert H. Memovich, Esq., Joseph B. Brooks, Esq., and Eugene A. Briggs, Esq., Office of the Solicitor, U.S. Department of the Interior, Portland, Oregon; Donald H. Coulter, Esq., Grants Pass, Oregon, for Crater Title Insurance Company and Transamerica Title Insurance Company of Oregon; Alfred H. Hampson, Esq., Portland, Oregon, for Karl P. Baldwin and Barbara S. Baldwin, executrix.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

The State of Oregon has appealed from a decision of the State Director, Oregon State Office, Bureau of Land Management (BLM), dated April 12, 1973,

rejecting applications for school indemnity lands OR 3162, OR 3163, OR 3164, and OR 3737. 1/ The basis for the rejection of the applications was the State Director's finding that the State of Oregon had exceeded its entitlement to make any further selections of land as indemnity for school lands lost to the State.

The State Director specifically found that the base lands offered by the State in OR 3164 were defective because the State admitted selling the land at a time when title to the State to the land in place could not have vested. The decision alludes to an extensive audit disclosing that indemnity selection lists had been previously approved containing base lands improper for use therein. Three principal examples of improper base are set forth: (1) Lands sold by the State prior to the date when title could have vested; (2) school lands in place, title to which had vested in the State, subsequently sold by the State through error or inadvertence, and title to which

1/ A timely notice of appeal was also filed by Crater Title Insurance Company and by Transamerica Title Insurance Company of Oregon. This notice was directed to BLM's rejection of State indemnity application OR 3163, filed by the State on behalf of the aforementioned organizations. A timely notice of appeal was also filed by Karl P. Baldwin and Barbara S. Baldwin, executrix of the Estate of George N. Baldwin, deceased. This document was directed to the rejection of State indemnity application OR 3164, which application was submitted by the State of Oregon for the benefit of Karl P. Baldwin and Barbara S. Baldwin, executrix. BLM's decision rejecting applications OR 3163-64 was based upon numerous transactions involving the State of Oregon dating back to its admission to the Union. Our resolution of the issues posed by the State is intended to be dispositive of the issues posed by these subsidiary appeals.

On Apr. 4, 1968, the State filed applications OR 3162, OR 3163, and OR 3164 entitled Indemnity School Land Selections. (State list numbers 1791, 1786, and 1787 respectively.) Application OR 3737 (State list number 1792A) was filed on September 20, 1968. For administrative convenience, serial number OR 7274 has been assigned by BLM to this final adjustment of school indemnity lands.

was eventually transferred to the United States as base for forest lieu selections under the Act of June 4, 1897, 30 Stat. 11, 36, as amended; and (3) lands described by township designations shown on existing surveys but previously described by different township designations on prior statutory protractions.

A notice of appeal was timely filed by the State of Oregon on April 30, 1973. Thereafter, the State questioned the adequacy of the 1973 audit which formed the basis for the State Director's decision. In June 1974, the State requested and was granted a reopening of the audit to redetermine the amount of valid base lands the State has offered or may offer to the Federal Government. As a result, a revised audit was prepared in 1976. The briefs and stipulations are based upon the January 1976 audit revision. The record transmitted to the Board included, however, yet another audit revision, this most recent revision prepared by BLM in December 1978.

The State subsequently filed objections to our consideration of the 1978 revision on the grounds that it was violative of the stipulation executed by it and BLM on August 23, 1976, and that it would needlessly confuse the issues. BLM responded that the revision was necessary, because the 1976 audit failed to adequately address the indemnity claims of the State by acreage, situs, and other categories of identification, such as withdrawals, state sales, patented lands, etc. In addition, BLM asserted that all matters appearing in the 1978 revision had been fully considered, briefed, and argued.

By order dated October 12, 1979, this Board ruled that it was constrained by relevant precedent to "consider and pass on all the evidence

upon which BLM relied in rendering its decision and which bears on the question of the State's indemnity entitlement as authorized by law." The State was granted 30 days in which to review the recent revision and to delineate with specificity its objections to the inclusion of new or different data of which it had no prior knowledge. Subsequently, by Order of September 22, 1981, oral argument before the Board was granted. Following various postponements at the request of the parties, the oral argument was heard at Portland, Oregon, on September 13, 1983.

Oregon was admitted to the Union by Act of Congress approved February 14, 1859, ch. 33, 11 Stat. 383. Section 4 of the Admission Act provided in material part as follows:

> That the following propositions be, and the same are hereby, offered to the said people of Oregon for their free acceptance or rejection, which, if accepted, shall be obligatory on the United States and upon the said State of Oregon, to wit: First, That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools. [Emphasis added.]

Recognizing that secs. 16 and 36 might be unavailable or lost to a state for a number of reasons, Congress enacted several statutes providing for selections of other public lands in lieu of those lost to the state. The Act of February 26, 1859, ch. 58, 11 Stat. 385, provided for the appropriation of lands of like quantity where secs. 16 or 36 may be patented by preemptors. The Act, codified in substantial part as Revised Statute 2275, 43 U.S.C. § 851 (1976), further provided for appropriations "to compensate

deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever."

Revised Statute 2276 provided certain arithmetic principles of adjustment to compute the quantity of land which the State could select as compensation for the deficiencies mentioned in section 2275. 2/

In 1891 and 1958, Revised Statute 2275 was amended 3/ to read as presently codified at 43 U.S.C. § 851 (1976):

> And other lands of equal acreage are also hereby appropriated and granted and may be selected, in accordance with the provisions of section 852 of this title, by said State where sections sixteen or thirty-six are, prior to survey, included within any Indian, military, or other reservation, or are, prior to survey, otherwise disposed of by the United States: Provided, That the selection of any lands under this section in lieu of sections granted or reserved to a State shall be a waiver by the State of its right to the granted or reserved sections. And other lands of equal acreage are also appropriated and granted, and may be selected, in accordance with the provisions of section 852 of this title, by said State to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

2/ This statute provides:

"The lands appropriated by the preceding section shall be selected * * * in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half, of a township, one-half section; and for a fractional township, containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one quarter-section of land."

3/ Act of February 28, 1891, ch. 384, 26 Stat. 796. Act of August 27, 1958, P.L. 85-771, 72 Stat. 928.

The Secretary of the Interior's duty to determine by protraction or otherwise the number of townships affected by a reservation was made clear:

> And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State shall be entitled to select indemnity lands to the extent of section for section in lieu of sections therein which have been or shall be granted, reserved, or pledged; but such selections may not be made within the boundaries of said reservation: Provided, however, That nothing in this section contained shall prevent any State from awaiting the extinguishment of any such military, Indian or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein.

43 U.S.C. § 851 (1976).

The principles of adjustment set forth in Revised Statute 2276 were carried over in material part by the amendments of 1891 and 1958. Revised Statute 2276, as amended, 43 U.S.C. § 852(b) (1976), now provides:

> Where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one-quarter section of land: Provided, That the States which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships.

Oregon's appeal from the State Director's rejection of its indemnity applications may be divided into two discrete subjects: Protractions, and forest lieu selections. 4/ Because of the complexity of the issues presented, the Board has determined to issue separate decisions on these two issues. Therefore, this decision shall discuss only those questions arising under transactions involving forest lieu selections. A subsequent decision shall deal with the protraction issues.

Forest lieu transactions were authorized by the Forest Lieu Exchange Act of June 4, 1897 (Forest Lieu Act), ch. 2, 30 Stat. 11, 36. The relevant portions of this Act provided as follows:

> That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent.

In the instant case, certain school sections (16 and 36) which had vested in a state had subsequently been included in a public forest reservation. These lands, if sold by a state would, therefore, be subject to the provisions of the Forest Lieu Act.

4/ The State had originally appealed from a finding of the BLM State Director that the State was not entitled to indemnity for 3,680 acres of land which had been included in a national forest prior to survey on the grounds that the United States had patented lands under the 1897 Act to private parties who had offered base lands, deeded from the State, to which the State had no title. At oral argument, however, the State waived its appeal as to this issue (Tr. at 5).

A number of sales were made by the State of Oregon to one F. A. Hyde and others in concert with Hyde. Hyde's plan was to purchase school lands from the State through dummy applicants and then exchange these lands within forest reserves for valuable public domain lands pursuant to the Act of June 4, 1897, supra. Section 3618 of Hill's Annotated Laws authorized citizens of the State of Oregon to purchase State lands but limited each citizen to purchasing 320 acres for his own use and not for the purpose of speculation. Hyde sought to avoid this limitation by the use of dummy applicants or fictitious entities, and managed to defraud the State of some 47,000 acres of school lands which he acquired at a price of $1.25 per acre (Stipulation at 39). Prior to 1903, Federal patents were issued to members of Hyde's conspiracy, the so-called Hyde Fraud Combine, in exchange for lands acquired from the State in the amount of 27,000 acres. This land was then sold by the patentees at a substantial profit. Id. at 40.

On November 21, 1902, the Secretary of the Interior, having been apprised of the fraud, issued an order suspending all applications for forest lieu selections bearing Hyde's name as applicant or as attorney for another applicant. Further orders in 1903 and 1904 suspended all applications for forest lieu selections involving Oregon school lands as base. Shortly thereafter on March 3, 1905, Congress repealed the Act of June 4, 1897, subject to a grandfather clause permitting selections, theretofore made, to be perfected and patented, and reselections to be made if a pending selection were held invalid for any reason not the fault of the selector.

In 1908, Hyde was tried and found guilty of criminal fraud, which conviction was eventually affirmed by the United States Supreme Court. 78 IBLA 264

United States, 225 U.S. 347 (1912). In 1910, the Department of the Interior commenced adverse proceedings against selections made by Hyde, but suspended these proceedings in 1912 to permit the State of Oregon to proceed with suits to cancel State deeds to the school lands used as base. The State began these suits in 1913 limiting its efforts to State deeds of base lands which had not been exchanged with the United States for patented, selected land. Final decisions of the Oregon Supreme Court were handed down in 1918. State v. Hyde, 88 Or. 1, 169 P. 757 (1918); State v. Hyde, 88 Or. 61, 169 P. 774 (1918); State v. Hyde, 88 Or. 66, 169 P. 775 (1918); State v. Hyde, 88 Or. 73, 169 P. 777 (1918); State v. Hyde, 88 Or. 81, 169 P. 778 (1918); State v. Hyde, 88 Or. 81, 169 P. 779 (1918).

In these decisions, the Supreme Court of Oregon divided the lands at issue into three categories which the parties have found convenient to refer to in their pleadings. Supplement A lands were base lands offered to the United States whose accompanying selection applications were approved by the General Land Office (GLO) but later caught in the Secretary's suspension order of 1902. No selected lands were ever patented pursuant to these forest exchange applications. Supplement B lands consisted of those lands offered as base in selection applications which were never approved by GLO. Supplement C lands were those lands which were never offered as base by Hyde for lieu selections (Stipulation at 43; see State v. Hyde, 169 P. at 762).

The Supreme Court of Oregon differentiated between lands in Supplement A and those in Supplements B and C. Because Supplement A lands had been offered as part of a selection application approved by GLO, the Oregon Supreme Court found that deeds to these lands had been accepted by the United States and,

accordingly, held that title to Supplement A lands had passed to the United States. State v. Hyde, 169 P. at 763. This title in the United States, Judge McCamant reasoned, made the United States a necessary party to any State cancellation proceedings. Inasmuch as the United States refused to enter an appearance as a party in these suits, a decision to dismiss cancellation proceedings of Supplement A lands was entered. State v. Hyde, 169 P. at 765. Insofar as Supplement B and C lands were concerned, Judge McCamant reasoned that since GLO had never accepted the application in which they were offered, no title had ever vested in the United States and, therefore, the United States was not a necessary party to the case. Accordingly, the court affirmed cancellation of State deeds to the base land.

Following this decision, GLO resumed adverse proceedings against the Hyde selections. The State of Oregon made an appearance in these proceedings, filing answers alleging fraudulent procurement of title. In 1920, the State, with the cooperation of the Department of the Interior, reached a compromise agreement with the transferees of selections whose base lands were within Supplement A. In consideration of $7.50 per acre from the transferees, the State would issue quitclaim deeds to the United States for the base lands involved in order to perfect title to the base and allow the selections to proceed to patent. The compromise was extended to all transferees of Hyde who were innocent of the fraud committed by him. As a result of this compromise, GLO halted its adverse proceedings relating to Supplement A lands, and the State quitclaimed 5,440 acres to the United States having received the preordained rate. In addition, the Hyde Fraud Combine quitclaimed to the State 2,600 acres of land for which it was not able to complete its selections (Stipulation 266 at 46).

Remaining adverse proceedings involving Supplement A lands were heard by GLO in 1922. In State of Oregon v. Hyde, 50 L.D. 420 (1924), the Department rejected a State protest to the approval of a lieu exchange to innocent third parties even though the exchange had been initiated by Hyde. The Department held that the State's failure to institute recovery proceedings in the 5 years since the decision of the Oregon Supreme Court had made its claims subject to the defense of laches, a defense available in this instance, to the innocent third party. With this finding, the State evidently decided to take no further action. Pending charges against various selections were dismissed, and thereafter the United States issued patents for 6,816.62 acres accepting Supplement A lands as base (Stipulation at 50).

From 1929 to 1932, 1,800 acres of Supplement A lands were offered by the State as base in exchange for selected lands. The State had acquired quitclaim deeds for these base lands from the Hyde Fraud Combine. This exchange, approved by GLO, was made pursuant to Presidential Proclamation of April 28, 1927, which carved a block of lands from the Siuslaw National Forest to provide lands for selection by the State in general satisfaction of its right to indemnity for lost school lands. The proclamation made no specific reference to the Hyde fraud lands. Later, under the Act of April 28, 1930, 46 Stat. 257, the United States quitclaimed 1,000 acres of Supplement A base lands to applicants during 1940, 1944, and 1945 (Stipulation at 54).

While the above actions were occurring with reference to the Supplement A lands, during the period from 1919 to 1923 GLO canceled forest lieu selections based on lands included within Supplement B. This was done by notices informing selectors of the recent Hyde cases and stating that the

lands offered in exchange were not the property of the selectors but of the State of Oregon (Stipulation at 46).

GLO approved State clearlists during the period 1929-32 and transferred title to the State to 68,666.01 acres of land pursuant to the aforementioned Presidential Proclamation of April 28, 1927. Of this amount 9,385.17 acres were selected by the State using Supplement B and C lands as base (Stipulation at 59).

Thus, of 11,185.17 acres at issue for which the State received land in exchange, 9,385.17 acres involved land for which the deeds had been cancelled by the Oregon State Supreme Court, i.e., Supplement B and C lands. As noted above, the State also received 1,800 acres in exchange for Supplement A lands. For the sake of convenience, we shall refer to these lands as Category I lands. The Government contends that these exchanges were improper because the State had no title to the lands which were offered as base for the selected lands, since legal title had already vested in the United States upon receipt of deeds from the State's grantees pursuant to the 1897 Act. Thus, the State should be required to substitute good base for that which had served as a basis of the exchange.

An additional 2,662.42 acres at issue represent lands covered by deeds not cancelled by the State Supreme Court (Supplement A lands) totaling 1,342.62 acres, 680 acres of Supplement B and C lands, and 640 acres of land which were not subject to the Hyde suit. In contradistinction to the first group of lands, the State of Oregon received nothing for this land, and it is the State's contention that this constitutes valid unused

base which BLM has refused to recognize. We shall refer to this group of claims as Category II lands.

The State makes alternate arguments with reference to these transactions. Insofar as the land which it successfully tendered as base for past exchanges is concerned, it contends that the Government has already determined that its title was good and sufficient when it approved the exchange and such a determination should not now, years after the fact, be open to collateral attack. Its main argument, however, as clearly presented at oral argument, is that regardless of whether or not BLM may reopen the question of the sufficiency of the base tendered in exchanges approved more than 40 years ago, the fact is that the State did have good title to the land offered. Because this argument is critical in determining not only the status of Category I lands, but those involved in Category II as well, we will examine the State's position in some detail.

[1] The State contends that there are two critical facets in a forest lieu selection: (1) relinquishment of base land and the selection of land in lieu of the relinquished lands; and (2) the determination by the United States that the proposed exchange is in compliance with the statute and regulations. Only after the occurrence of these two events, the State argues citing Roughton v. Knight, 219 U.S. 537 (1911), does the United States obtain an equitable interest in the offered lands. While the State does suggest in passing, that the United States never determined that the proposed exchanges were in compliance with the statute, its primary thrust is that there never was a valid relinquishment of base lands and thus there is no way that the

United States could obtain title to the lands offered. In making this argument, the State relies heavily on the decision of the United States Supreme Court in Hyde v. Shine, 199 U.S. 62 (1905). Before examining the nature of the State's argument, it is useful to briefly review that decision.

As noted earlier, F. A. Hyde was convicted of criminal conspiracy to fraudulently obtain land from the States of Oregon and California, exchange these lands for public lands of the United States, and then sell those lands so obtained. This conviction was ultimately affirmed by the Supreme Court. See Hyde v. United States, supra. The indictment, however, had been returned by a grand jury of the Supreme Court of the District of Columbia. Hyde was, at that time, a resident of San Francisco, California. Upon the return of the indictment, therefore, a complaint was made in the Northern District of California seeking removal of the defendant to the District of Columbia for trial pursuant to Revised Statute 1014. Hyde was thereupon arrested and an order for removal was subsequently entered. United States v. Hyde, 132 F. 545 (N.D. Cal. 1904). Hyde pursued a writ of habeas corpus to the circuit court, which was denied, and then sought review in the United States Supreme Court.

In his petition for a writ of habeas corpus, Hyde argued, inter alia, that the indictment charged no crime against the United States. While admitting that the facts as alleged might show a crime against California or Oregon, Hyde contended that the United States was not defrauded as no injury had resulted to the United States. Intrinsic to this argument was the subsidiary contention that "[t]he patents of the State surrendered to

the United States conveyed a legal title which, until attacked directly by the State of California, was good, and so long as the patents remained unassailed the State had no equitable title in the land and the United States got good title to the land surrendered and was not defrauded." Hyde v. Shine, supra at 67.

In affirming the denial of the petition for a writ of habeas corpus, the Supreme Court directly addressed this contention. The Court recounted Hyde's contention but noted that it "assumes that the title acquired by the defendants from the States in question was such a title as, upon conveyance to the United States, would vest in the latter a title good as against all the world." Id. at 80. The Court then proceeded to consider this assumption. We will quote the Court's language in extenso.

> While it is doubtless true that, by means of these corrupt and fraudulent practices, Hyde and Benson may have obtained title to these lands, it does not follow that the States might not have disaffirmed such titles and recovered the lands. * * * Nor does it follow that, when subsequent conveyances were made to the United States of these lands under the act of June 4, 1897, a good title was vested in the grantee. In [Moffat v. United States, 112 U.S. 24 (1884)] it was held that a patent issued to a fictitious person conveys no title which can be transferred to a person subsequently purchasing in good faith from a supposed owner. In delivering the opinion of the court, Mr. Justice Field observed: "The patents being issued to fictitious parties could not transfer the title, and no one could derive any right under a conveyance in the name of the supposed patentees. A patent to a fictitious person is, in legal effect, no more than a declaration that the Government thereby conveys the property to no one. There is, in such case, no room for the application of the doctrine that a subsequent bona fide purchaser is protected. * * * To the application of this doctrine * * * there must be a genuine instrument, having a legal existence, as well as one appearing on its face to pass the title. It cannot arise on a forged instrument or one executed to fictitious parties, that is, to no parties

> at all, however much deceived thereby the purchaser may be. [Emphasis supplied.]

Id. at 80-81.

The State, in effect, argues that this language clearly shows that the United States never obtained title to any of the base lands offered by Hyde and, therefore, not only was the subsequent exchange in the Siuslaw National Forest proper, but the State also still has outstanding lieu rights which have never been exercised. There are, however, certain problems with the State's argument.

In the first place, insofar as the Supreme Court of Oregon refused to cancel the State patents issued for Supplement A lands in State v. Hyde, 169 P. 757 (1918), such action must be viewed as inconsistent with the United States Supreme Court decision in Hyde v. Shine, supra, as now interpreted by the State of Oregon. The premise for the Oregon Supreme Court's refusal to cancel the patents was that inasmuch as the United States had accepted the deeds and approved the selection, title to the offered lands had passed to the United States. Thus, after reviewing certain United States Supreme Court decisions, the Oregon Supreme Court, per Judge McCamant, stated:

> The title so acquired may be voidable for fraud or mistake; the General Land Office may have power for good cause to rescind its approval and withhold patent to the selected land. It is enough for present purposes that, under the construction given this federal statute by the federal Supreme Court, title to the base lands passes to the United States on the acceptance of the deed and the approval of the selection by the General Land Office.

Id. at 762. Subsequently, the court opined:

> When the deeds to the base lands were accepted, the United States acquired a title. It may have been a bad title, subject to be divested by a court of competent jurisdiction; but the title cannot be adjudicated in a cause to which the United States is not a party.

Id. at 764. If, as the State of Oregon now contends, the United States Supreme Court had determined that the United States acquired no title from Hyde, there would have been no reason to refrain from cancelling the deeds issued for Supplement A lands. Obviously, the decision of the Oregon Supreme Court proceeds on a different premise from that which appellant asserts the United States Supreme Court had declared the law to be.

An additional difficulty in crediting the State's present interpretation of Hyde v. Shine, supra, arises upon a review of numerous decisions rendered by the United States Supreme Court subsequent to that decision. Thus, the next year, the Court held in United States v. Detroit Lumber Co., 200 U.S. 321 (1906), that bona fide purchaser protection was available to an innocent purchaser of timber land, even if it could be shown that the timber lands were procured by fraudulent misrepresentation.

There is a key distinction implicit in the decision in Hyde v. Shine, supra, which the State has overlooked. This is the distinction between a patent issued to a fictitious person and a patent fraudulently procured by a real person. The language of the Court in Hyde v. Shine, which we set forth in the text, is clearly directed only to the former situation. Indeed, the decision which is quoted therein, Moffat v. United States, supra, involved precisely that, patents issued to nonexistent individuals through the collusion of GLO employees. A patent issued to a fictitious person is

void, per se. See Sky Pilots of Alaska, Inc., 40 IBLA 355, 367 (1979) and cases cited. A patent fraudulently procured, however, is merely voidable.

That the Court which decided the Hyde v. Shine case was aware of this distinction is made clear when other parts of its decision are examined. Thus, the Court had noted that there were two mechanisms by which Hyde and his confederates had attempted to acquire State lands in California and Oregon "(1) in the names of fictitious persons, and (2) in the names of persons not qualified to purchase the same." 199 U.S. at 78. The discussion of the Court as to fictitious persons upon which the State of Oregon places so much reliance is but the first half of a bifurcated treatment of the issues. Subsequently, the Court declared:

> The indictment under section 5440 charges a conspiracy to defraud the United States out of the possession, use of and title thereto of divers large tracts of the public lands, and if the title to these lands were obtained by fraudulent practices and in pursuance of a fraudulent design, it is none the less within the statute, though the United States might succeed in defeating a recovery of the state lands by setting up the rights of a bona fide purchaser.

Id. at 83.

We are of the view that, to the extent that the base lands were patented to fictitious persons, the State of Oregon is correct in its assertion that no title passed to the United States and that those deeds were void. On the other hand, to the extent that the State of Oregon deeded such base lands to real individuals, even though they be dummies or nominees in collusion with the Hyde Combine, such deeds were merely voidable, and could be nullified only pursuant to proper legal action.

Such, indeed, was the holding of the Department as far back as 1910, when First Assistant Secretary Pierce so held in Thomas B. Walker, 39 L.D. 426, another case growing out of the Hyde fraud. Thus, the First Assistant Secretary noted that where the base lands had been patented by a state to a fictitious person "the United States could in no event secure a good title to the base land." Id. at 431. The distinction between this situation and that which occurred when a patent was obtained through fraudulent means by a real person was further explored in Peter M. Collins, 44 L.D. 495 (1915). We adhere to the views expressed in those cases.

We think it clear that the great bulk of the fraud perpetrated by the Hyde Fraud Combine involved nominees rather than fictitious persons. See State v. Hyde, supra at 766-67. Thus, the application of the void deed doctrine delineated by the United States Supreme Court in Hyde v. Shine, supra, will necessarily be quite limited. It is not the purpose of this decision to determine with finality the exact acreage figures involved in various aspects of this decision. Rather, as stated in our Order of October 12, 1979, this decision will merely decide the issues of law and fact as framed in the stipulation. On remand, the parties shall review the specific audit computations in conformity with our determinations. To the extent that the State of Oregon can show that State deeds were issued to fictitious individuals, the State is properly credited with ownership of the original base. But, to the extent that State deeds were issued to real individuals, it becomes necessary to examine the various contentions of the parties as presented in the stipulation.

We shall examine the Category I acreage first. It is important to note that the following discussion will assume, arguendo, that all lands involved had been deeded by the State to real individuals who were participants in the Hyde fraud. As noted above, Category I acreage consists of Supplement A, B, and C lands for which the State eventually received lands in exchange between 1929 and 1932. We will examine the Supplement A lands first.

[2] After the decision of the Oregon Supreme Court in State v. Hyde, supra, the State of Oregon obtained a number of quitclaim deeds from the Hyde Fraud Combine of Supplement A lands. Of the acreage quitclaimed to the State, a total of 1,800 acres was eventually tendered as base for the purposes of blocking out Federal and State ownership of tracts in the area of the Siuslaw National Forest. BLM now contends that GLO erred in approving this exchange. BLM's argument proceeds as follows. The Oregon Supreme Court had held that the United States held title, whether defeasible or not, to the lands in Supplement A because the GLO had accepted the deeds to the base lands tendered by Hyde and his associates. The fact that Oregon had subsequently acquired the rights of Hyde did not change the status of the base lands. Title to these lands remained in the United States. It may be that by acquiring a quitclaim from Hyde the State also acquired the right to complete the forest lieu exchange initiated by Hyde. But such an exchange could only be completed under the auspices of the 1897 Act. The Presidential Proclamation of April 28, 1927, which authorized the subsequent exchange of lands under the 1891 Act, however, applied, by its own terms, only to an exchange of State school lands within various national forests, title to

which was in the State, for lands in the Siuslaw National Forest. 5/ Consistent with the decision of the Oregon Supreme Court, as the State of Oregon no longer had title to the school lands involved in Supplement A these lands could not properly serve as base for the exchange. Thus, the action of the GLO in approving the exchange with these lands as base was ultra vires, and the State should be required to substitute unused school base.

The State, for its part, repeats its assertion that BLM is attempting a collateral attack on the validity of a federal patent (in this case, a clear list) and that such an attack is invalid because the 6-year statute of limitations for setting aside a patent has long since expired, and there is no allegation of fraud in its obtention. Suffice it to say at this point that the State's title to any of the selected lands is not in jeopardy. See Reid v. Mississippi, 30 L.D. 230 (1900). BLM's audit seeks to determine only whether adequate base has been exchanged for selected lands, and, even if the net result of the audit is that Oregon has exceeded its entitlement, BLM eschews any claim that such excess must be reconveyed to the United States. Thus, there is no attempt to defease the State of title to any lands which have already been clear listed. The argument of the State on this point must be rejected.

The State also attacks the position of BLM as somewhat disingenuous. It notes, that while BLM implies that the State could have consummated a

5/ The Act of Feb. 28, 1891, 26 Stat. 796, authorized any state, in the event that any of the in place school lands granted the state should, after the vesting of title in the state, be included within a public reservation, to waive its right thereto and to select in lieu thereof other lands of equal acreage from unappropriated nonmineral public lands outside the limits of the reservation, but within the state.

forest lieu exchange after having acquired the quitclaims from Hyde and his associates, the fact of the matter is that authority to make a selection under the Forest Lieu Act terminated on March 3, 1905, when the Forest Lieu Act was repealed. The United States would be unjustly enriched, argues the State, if it were allowed to maintain title to the base lands tendered by Hyde and at the same time prohibit the State from using that base as exchange lands, particularly where the State had acquired all rights relating to the forest lieu selection from Hyde. Finally, the State argues that the United States is in laches on this issue, seeking to reopen matters which had long since been determined with finality.

Before analyzing these arguments, it is useful to review the relevant Acts relating to forest lieu selections. As noted above, the Forest Lieu Act of 1897 had provided that the settler or the owner of a bona fide claim or patent within the confines of a forest reserve could relinquish that tract to the Federal Government and select in lieu thereof a tract of vacant Federal land open to settlement. Owing in no small part to the Hyde fraud, this Act was repealed by the Act of March 3, 1905, 33 Stat. 1264. 6/ The 1905 Act contained the following proviso:

6/ As the Department noted in J. A. Allison, 58 I.D. 227, 232 (1943): "The forest lieu legislation under which the right here in question originated was repealed in 1905 because it had not operated in the public interest. It had been designed to relieve actual settlers, entrymen and patentees whose lands had become or in future might become included within forest reserves by permitting such persons to exchange their imprisoned lands for tracts outside the reserves. But, as it transpired, the principal beneficiaries of the legislation were not those persons but were the owners of railroad and State school lands, who in most cases had purchased such lands for use as base in lieu selections. In practice therefore the lieu acts opened the door to wholesale exchanges of reserved lands which had been denuded of their timber and were therefore of comparatively little worth for the most heavily timbered and valuable Government lands situate anywhere outside the reserves. They also led to the notorious California and Oregon timberland frauds, which culminated in numerous convictions of both high and low." [Footnotes omitted.]

> That selections heretofore made in lieu of lands relinquished to the United States may be perfected and patents issue therefor the same as though this Act had not been passed, and if for any reason not the fault of the party making the same any pending selection is held invalid another selection for a like quantity of land may be made in lieu thereof.

While this permitted the completion of the patenting process for forest lieu selections which had been filed in accordance with the applicable procedures, and to make new selections where the selected lands were not available through no fault of the selector, there was no provision which would permit the Department to reconvey the base lands tendered. This deficiency was remedied by the Act of September 22, 1922, 42 Stat. 1017. That Act provided, in relevant part:

> That where any person or persons in good faith relinquished to the United States lands in a national forest as a basis for a lieu selection * * * and failed to get their lieu selections of record prior to the passage of the Act of March 3, 1905 * * * or whose lieu selections, though duly filed, are finally rejected, the Secretary of the Interior * * * is authorized to accept title to such of the base lands as are desirable for national-forest purposes, which lands shall thereupon become parts of the nearest national forest, and, in exchange therefor, may issue patent for not to exceed an equal value of national-forest land * * *. Where an exchange can not be agreed upon the Commissioner of the General Land Office is hereby authorized to relinquish and quit-claim to such person or persons, their heirs or assigns, all title to such lands which the respective relinquishments of such person or persons may have vested in the United States.

Section 2 of this Act provided that where the Government had already committed the base lands to a governmental use, other than that for which the forest reserve had been set aside, such lands could not be relinquished without the approval of the head of the Department having jurisdiction over the land. If such approval was withheld, or if the land selected had otherwise been

disposed, other nonmineral public lands of approximately equal area and value could be selected. Two different time limits were provided for in this Act. All persons desiring to benefit from the provisions of the Act were given 5 years in which to provide the United States with satisfactory proof of relinquishment to the United States. In addition, under section 2 of the Act, applications to make lieu selections were required to be filed within 3 years of the effective date of the Act. It should also be noted that the Act was carefully drafted so as not to declare exactly what type of title the United States had originally received. 7/

By the Act of April 28, 1930, 46 Stat. 256, general provision was made to allow the United States to issue quitclaim deeds for lands which had been conveyed to the United States pursuant to a proposed exchange of land where the application for an exchange was either withdrawn or rejected. While this Act was not specifically directed to lands tendered under the Forest Lieu Act, its general terms clearly covered such lands.

The Act of August 5, 1955, 69 Stat. 534, (quoted in the note to 43 U.S.C. § 274 (1976)) required various owners of scrip or lieu rights, including "a forest lieu selection right, assertable under the Act of

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7/ This becomes important since in light of Roughton v. Knight, supra, it was certainly open to question whether the Government obtained any title in those situations where the applicant had failed to make a selection with the purported relinquishment of title. Thus, the Supreme Court had held that the regulations requiring that the deed of relinquishment to be accompanied by a selection was not unreasonable. The Court quoted from the decision rejecting the application involved in that case:

"[U]nder the act of June 4, 1897, it is the filing of the deed in the local land office and the selection of land in lieu of that relinquished which initiates the exchange. Until that time the exchange is not initiated and is merely a purpose in the private owner's mind."

219 U.S. at 548.

March 3, 1905" to record their holdings with the Department of the Interior within 2 years of the Act. Section 4 of that Act provided that if claims were not presented within the time established by that Act, they would "not thereafter be accepted * * * for recordation or as a basis for the acquisition of lands."

By the Act of July 6, 1960, 74 Stat. 334, Congress sought to end the increasing practice of reconveying base lands to forest lieu applicants under the 1930 Act. This Act is commonly referred to as the Sisk Act. Section 1 of that Act, provided, in relevant part:

> [t]he Secretary of the Interior shall certify to the General Accounting Office for audit the claim of any person who relinquished or conveyed lands to the United States as a basis for a lieu selection in accordance with the provisions of the fifteenth paragraph under the heading "Surveying the Public Lands" in the Act of June 4, 1897 (30 Stat. 11, 36), as amended and supplemented by the Acts of June 6, 1900 (31 Stat. 588, 614), March 3, 1901 (31 Stat. 1010, 1037), March 3, 1905 (33 Stat. 1264) and the Act of September 22, 1922 (42 Stat. 1017, 16 U.S.C. 483), and who has not heretofore received his lieu selection, a reconveyance of his lands, or authority to cut and remove timber, as provided by law, and there shall be paid to each such person whose claim is found to be valid the sum of $1.25 per acre for the lands conveyed by him to the United States with interest thereon at the rate of 4 per centum per annum, from the date on which the application was last made by said person for a lieu selection, for reconveyance, or for authority to cut and remove timber or, if no such application has been made, from the date of this Act. Said payment shall be made from moneys appropriated under the heading "Claims for Damages, Audited Claims, and Judgments," and acceptance thereof shall constitute a full and complete satisfaction of all claims which the person to whom payment is made may have against the United States arising from the transaction in connection with which the payment is made. No person shall receive, or be entitled to receive, payment under this Act except upon demand therefor made in writing to the Secretary, or any officer of the Department of the Interior to whom the Secretary delegates authority to receive such demand, within one year from the date of this Act.

As noted by Congress, the purpose of this Act was:

> to provide compensation for land conveyed or relinquished to the United States during the years 1897-1905 under the act of June 4, 1897 (30 Stat. 11, 36), in cases in which the lieu lands or other rights which the owners were entitled to receive under this 1897 act and supplementary legislation have not already been given them; (2) to make inapplicable to the owners, their heirs and assigns a later provision of law directing the Secretary of the Interior, upon request, to return the original lands; and (3) thus to correct defects in the law under which such parties are now laying claim to valuable lands within the national forests and parks and taking them out of Federal ownership.

S. Rep. No. 1639, as cited in 1960 U.S. Code Cong. & Ad. News 2743. In order to effectuate the legislative intent, section 3 of the Act repealed the Act of September 22, 1922, 42 Stat. 1017, and prohibited the reconveyance of any land to which section 1 applied. In addition, section 4 of the Act provided:

> Any land for which the United States makes payment under section 1 of this Act, or any land for which it might make payment thereunder upon application by the proper party, but for which no demand is made, shall (unless it has heretofore been disposed of by the United States) be a part of the national forest, national park, or other areas within the boundaries of which it is embraced * * *.

It is important to note that while the Sisk Act did remove all authority for the reconveyance of lands tendered under the Forest Lieu Act, and did constitute a complete satisfaction of all claims presented for payment under its terms, it did not terminate all selection rights emanating from forest lieu transactions. As we noted above, the 1955 Recordation Act had only applied to those claims "assertable under the Act of March 3, 1905." The Sisk Act did not purport to terminate the selection rights of these claims,

unless payment was accepted pursuant to section 1 of the Act. Congress specifically noted this facet of the Act:

> Question was raised in the committee hearings and discussion whether there still is, and whether there ought to continue to be, a right to select lieu lands for those conveyed in 1897-1905. The committee has not attempted to resolve these questions since they do not affect the principal problem with which H.R. 9142 is concerned.

S. Rep. No. 1639, as cited in the 1960 U.S. code Cong. & Ad. News 2743, 2746. Thus, under the Sisk Act, if a forest lieu claim had been assertable under the 1905 Act, and had been recorded under the 1955 Act, and the claimant had received no payment under the 1960 Act, the right to select lands was still outstanding. 8/

Finally, by the Act of August 31, 1964, 78 Stat. 751, Congress attempted to write the last chapter in the tangled history of the Forest Lieu Act. This Act dealt with all rights of scrip and lieu recorded pursuant to the 1955 Act. Sections 2 and 3 provided for the classification of lands for conveyance to satisfy such claims. Section 6 allowed for a claimant to elect to receive cash instead of public land in satisfaction of his claim. Section 1 provided, in the case of forest lieu claims, that any claim not satisfied under these sections by January 1, 1970, "shall become null and void." It is, therefore, clear that any outstanding forest lieu selection right which has not been

8/ The Ninth Circuit Court of Appeals noted this fact in Udall v. Battle Mountain Co., 385 F.2d 90, 96 (1967), pointing out that the 1964 Act, discussed infra in the text, provided compensation on a different basis as an alternative to selection. See also Masonic Homes of California, 4 IBLA 23, 28-29 (1971).

terminated by either the provisions of the Sisk Act or the 1964 Act is, nonetheless, a nullity, and cannot serve as the basis for any present land acquisition.

[3] We note that in oral argument counsel for the State expressly disclaimed any subrogation to the selection rights arguably flowing from the original Hyde applications (Tr. 31-32). At that time, of course, the primary thrust of the State's argument was based on its analysis of Hyde v. Shine, supra, to the effect that the deeds tendered by Hyde to the United States were void. We have already rejected this analysis to the extent that the original State deeds were issued to real individuals, regardless of whether they were participants in the Hyde scheme. Therefore, despite the State's disclaimer, we will consider the subrogation question.

It is our view that the relevant case law cited above clearly shows that, insofar as Supplement A lands were concerned, the United States acquired title to the base lands offered. We noted above that the State, with respect to the 1,800 acres of Supplement A lands in Category I, obtained quitclaim deeds of the base land from Hyde. What, then, did these quitclaim deeds vest in the State?

Consistent with both State v. Hyde, supra, and Roughton v. Knight, supra, these deeds could not, in and of themselves, serve to vest title to the base lands in the State as the United States was not a party to these transactions. The State, however, suggests that the acquisition of these quitclaim deeds, when conjoined with the rejection of the selection applications, served to revest title in the State, and thus, made the land proper

base for an exchange under the 1891 Act (Stipulation at 61). We do not agree.

As the United States Supreme Court implicitly held, upon acceptance of the application for exchange under the Forest Lieu Act, title to the base lands vested in the United States. All lands in Supplement A involved applications which were originally accepted by the GLO. Thus, at that time, the base lands came into Federal ownership. The applicant, however, did not simultaneously receive title to the selected lands. On the contrary, a substantial number of applications involved selected lands which had not been surveyed, and, thus, title to the selected lands could not have vested until they were surveyed. What the applicant acquired upon the vesting of the base lands in the United States was a contractual right to lands equal in area to those offered and a preference right to the lands selected in the application. See Work v. Read, 10 F.2d 637, 638-39 (D.C. Cir. 1925).

Subsequent rejection of an application already accepted could not result in an automatic reconveyance of the base lands under the Forest Lieu Act, since the original acceptance created a contractual right in the applicant which could not be defeated by unilateral action on the part of the Government. It may be that upon the ultimate rejection of an application which had already been accepted the applicant might have a cause of action for breach of contract (including the possible remedy of either recision or specific performance). This question, however, is not before us. It is sufficient for our purposes to note that, in the absence of such a suit, title to the base lands did not revest to the applicant, or his successor-in-interest upon rejection of the application. Nor could the United States,

until 1922, voluntarily reconvey the land since until that time it lacked any authority to reconvey lands the title to which it had obtained under the Forest Lieu Act.

We think it clear, therefore, that the quitclaims received by the State from Hyde did, in fact, subrogate the State to Hyde's selection rights under the Forest Lieu Act, and that title to the base did not revest in the State. This being the case, BLM is technically correct in its assertion that the State tendered improper base under the 1927 Presidential Proclamation as that order obviously envisaged the offering of lands then owned by the State as base. The lands involved herein were already under Federal ownership pursuant to the 1897 Act, at the time the State tendered them.

[4] That being said, however, we agree with the State that it would be a great injustice to now make the State substitute unused school land base for the forest lieu Supplement A base tendered between 1929-32. Having acquired the interest of Hyde, and being free of the taint of fraud which led the United States to reject the original selections made by Hyde, the State could have selected lands under the 1905 Act or have acquired the selections actually made by Hyde, if available. 9/ It is true that under the 1927 Proclamation only school lands, title to which was then in the State, could be used as a

9/ It is clear that the bad faith of Hyde did not work to defeat a selection made by Hyde when an innocent third party had succeeded to his interests. Thus, the whole train of Departmental decisions following State of Oregon v. Hyde, supra, was premised on the theory that a forest lieu exchange could be completed so long as the real party in interest at that time was an innocent third party. It is, therefore, clear that the State, an equally innocent third party, could have completed any exchanges initiated by Hyde.

basis for exchange. Had the State been properly informed at that time that the Supplement A lands could not be used as base it could have, at that time, substituted proper base for that exchange and still have exercised the forest lieu selection rights it acquired from Hyde to obtain title to other land, or, under the 1930 Act, a reconveyance of the base lands. The United States, in fact, accepted the proffered base. Now, when all possibility of obtaining anything for the rights the State had acquired from Hyde is at an end, the United States seeks a substitution of school land base for the forest lieu base it had formerly accepted.

We think it almost a certainty that the State has obtained far more than 1,800 acres in exchanges under the 1891 Act for land which would have been equally available for selection under the 1897 Act. Indeed, it is likely that the State would have expressly exercised its 1897 Act rights long ago had it not believed it had already done so under the Presidential Proclamation of 1927. We think, given the unusual facts of this case, the United States is properly estopped from asserting that the State did not do precisely that. We hold, therefore, that the State will not be required to substitute unused school land base for the 1,800 acres of Supplement A lands involved in Category I.

[5] BLM also attacks the use of Supplement B and C lands as base for the Siuslaw National Forest exchange. Here, however, rather than basing its argument on the decision of the Oregon Supreme Court as it did for the Supplement A lands, it contends that the decision was wrong as to the Supplement B and C lands and ineffective to divest the United States of title to those lands. The linchpin of BLM's position is its interpretation of the United

States Supreme Court decision in Wyoming v. United States, 255 U.S. 489 (1921). Because of the emphasis which BLM places on Justice Van Devanter's decision therein, we will examine its parameters in some detail.

In 1912, the State of Wyoming filed a lieu selection for a parcel of land pursuant to the 1891 Act, offering as base a parcel of land which had passed into State ownership in 1897, but which had since been included within the Big Horn National Forest. As the Supreme Court noted in its decision, at the time the State made its selection "the State had a perfect title to the tract in the reserve and the land selected in lieu thereof was vacant, unappropriated, and neither known nor believed to be mineral." Id. at 494. Notice of the proposed exchange was published and, in due course, the papers were transmitted by the local officers to the GLO with a certificate stating that no objections had been filed and that no adverse claim existed as to the selected lands according to the records in their offices.

No action was taken by the Commissioner, GLO, for nearly 3 years. On May 16, 1914, however, while the papers were pending before the Commissioner, a total of 88,000 acres of land, including the selected land, were withdrawn as possible oil land under the Pickett Act, Act of June 25, 1910, 36 Stat. 847. Subsequently, when the Commissioner considered the application of the State of Wyoming, he refused to approve it unless the State would either accept a certificate limited to the surface of the selected land or show that the land was still not known or believed to be mineral. The State declined to accept either option, instead arguing that its rights under the selection could only be determined with reference to the time at which it submitted its waiver and application. Thereupon, the Commissioner ordered the selection

canceled, which decision was subsequently affirmed by the Secretary of the Interior. The State pursued legal review in the Federal courts, and, from an adverse ruling of the Court of Appeals for the Eighth Circuit, took an appeal to the United States Supreme Court.

In reversing the circuit court, the Supreme Court, per Justice Van Devanter, posed the issue before it as follows:

> [T]he question is whether it was admissible for those officers to test the validity of the selection by the changed conditions when they came to examine it, instead of by the conditions existing when the State relinquished the tract in the forest reserve and selected the other in its stead.

Id. at 496. Justice Van Devanter reviewed various pronouncements of the Court on similar questions and concluded:

> [T]he Commissioner and the Secretary in acting thereon are required to give effect to the conditions existing when it was made, that if it was valid then they are not at liberty to disapprove or cancel it by reason of a subsequent change in conditions and that in this regard the statute under which the selection was made does not differ from other land laws offering a conveyance of the title to those who accept and fully comply with their terms.

Id. at 500.

The thrust of the argument posed by BLM is that this decision makes clear that the Oregon Supreme Court erred in its holding that title to lands offered as base in a forest lieu exchange vested in the United States only upon an act which could be deemed an acceptance. Rather, BLM contends, since

it has been generally agreed that title to the base property tendered in a lieu selection would certainly have vested in the United States no later than the vesting of title to the selected property in the applicant, and the United States Supreme Court had determined that vesting of title to the selected property in an applicant is not controlled by the actual date in which the Department examines the proposed exchange, the vesting of title to the offered lands in the United States is, itself, not dependent upon actual review of the application by the duly authorized officers. Therefore, BLM concludes, to the extent that the Oregon Supreme Court purported to cancel the deeds issued to Hyde for Supplement B and C lands on the theory that the United States had acquired no rights because the officers had not "accepted" the applications, such action was clearly premised upon a mistake of law.

The basic problem with BLM's analysis is that, given the facts of this case, its ultimate conclusion does not flow from its premise. The Supreme Court did not state that the mere filing of an application for exchange accompanied by a selection vests title in the applicant. Rather, the Supreme Court held that the filing of a proper exchange so acts. It is clear from the Court's decision in Wyoming v. United States, supra, that the acceptability of the proposed exchange is to be judged by advertence to the conditions occurring at the time of the filing of the application. What BLM overlooks, however, is that the attempted transfer of the base property to the United States was the result of fraudulent activities.

It is true, of course, that as of the time the United States came to examine the exchange applications for Supplement A lands, this fraud had not yet come to light. But BLM errs in assuming that the test of the validity of

the application is dependent upon what the specific officers of the Department knew at the time the application was filed as opposed to what the facts were at that time. Such is not the case.

The fallacy in BLM's position becomes clear if one remembers that prior to the adoption of the Taylor Grazing Act, 43 U.S.C. § 315 (1976), it was possible to initiate a homestead entry through settling on the lands sought without informing GLO before commencing settlement. As the Department noted in Circular No. 541, 48 L.D. 389 (1922), so long as a settler on surveyed lands made entry in the local land office within 3 months of settlement, a preference right to make the entry arose upon occupancy of the lands. Id. at 391. Such right was good against all but the United States. See Rice v. Simmons, 43 L.D. 343 (1914). Thus, it was clearly possible that during the 3-month period between settlement and entry a State might file an exchange application for the land so settled. The fact that no official of the GLO knew of the settlement as of the date of the filing of the exchange application would not serve to vest title in the State to the selected lands in derogation of the rights acquired by the settler. On the contrary, so long as the settler filed an application to enter the lands within the period afforded by the applicable rules, the application of the State was properly rejected as the lands were not available when the selection was filed.

It may be that BLM was misled by the fact that the precise issue involved in Wyoming v. United States, supra, was the mineral character of the selected land. Such a determination, i.e., whether the land is known or believed to be mineral in character, necessarily involves consideration of a specific time frame. But it is clear that even this question is independent

not upon the facts actually known by the deciding officers or the subjective beliefs which they may have formed, but rather on the facts then available. With reference to Wyoming v. United States, under the facts available in 1912, no one would know or have an adequate basis upon which to found a credible belief that the selected lands were valuable for minerals. In contradistinction, insofar as the instant matter is concerned, at the time the Hyde applications were tendered to the Department, the knowledge of the fraud was clearly held by the applicants, even if by no one else.

It is true that as of the time that the Department acted to approve the applications involved in Supplement A the authorized officers were still personally unaware of the fraudulent nature of the applications. The act of approval, however, effectively vested title in the offered lands in the United States, notwithstanding the fact that these same officers could have, had they been properly informed, rejected the applications. Approval of such applications was, as the United States Supreme Court noted in Wyoming v. United States, supra, in the nature of a judicial act. Id. at 497. Approval of the applications involved in Supplement A was effective, even though based on false assumptions, to the same extent that an erroneous judicial decision is effective upon rendition. Unless set aside on a direct appeal or subjected to successful attack in a collateral proceeding, such a decision, even though wrong, binds the parties. As noted above, no direct appeal was ever undertaken nor did the State ever attempt to reacquire title to the offered lands in a collateral proceeding involving the United States. Thus, while it can be seen from the vantage of hindsight that the Department erroneously approved the applications, this recognition does not nullify the effectiveness of the approval to vest title to the offered land in the United States.

This analysis, however, clearly does not apply to Supplement B and C lands since the Department never exercised its judicial function to approve the applications. As it is clear that, under the facts attendant to the filing of the applications for these lands, they would have been properly rejected and, thus, the applicants never obtained any vested rights in the selected lands, we find nothing to undermine the analysis of the Oregon Supreme Court in State v. Hyde, supra, that the United States did not acquire title to Supplement B and C lands by the mere receipt of the applications involved therein.

In light of our finding, it is obvious that BLM's contention that the State must substitute unused school base for the Supplement B and C base used with respect to the Siuslaw National Forest exchange cannot be sustained, since the State did, in fact, have title to these lands sufficient to support an exchange under the 1891 Act.

[6] However, the 1978 audit has raised a subsidiary issue with respect to Supplement B and C lands in both Category I and Category II. BLM now contends that some of these lands were improperly treated as Supplement B or C lands when they should have been classified as Supplement A lands. BLM supports its contention by pointing out that some of the parcels of land offered as base were included in deeds embracing a number of different parcels. In numerous instances under both Categories I and II, GLO subsequently issued forest lieu patents in exchange for those other lands which had been included in the deeds. See 1978 Audit, Part 4 at 164-67, 168. BLM argues that obviously GLO could not accept only part of a deed and, therefore, regardless of the fact that GLO never patented exchange lands which used the instant

lands as base, GLO must have, in fact, "accepted" the deeds involving the lands at issue. Such an acceptance would, therefore, transfer such offered lands from Supplement B status to Supplement A status. There is a compelling logic to BLM's assertions.

While we agree with the legal principles enunciated by the Oregon Supreme Court in State v. Hyde, supra, this does not mean that its factual findings are immune from independent review. To the extent that the record can establish that GLO accepted an application, the base tendered in such an application is properly treated as Supplement A lands, regardless of whether or not the Oregon Supreme Court purported to cancel the State deeds issued to Hyde. As Supplement A lands, the State could acquire no rights unless it had succeeded to the rights of the forest lieu applicant as noted above. There is no indication in the record that the State ever acquired any subrogation rights as to these lands which may have been erroneously classified by the Oregon Supreme Court as Supplement B or C lands.

We are aware that the State has strenuously objected to consideration of the 1978 audit within the confines of this appeal. While we feel that, for the reasons set forth in our Order of October 12, 1979, we cannot ignore the information presented in this audit, we also believe that it would be improper to direct any specific action in regard to the questioned Supplement B and C acreage without first affording the State an opportunity to respond to these allegations before BLM. Therefore, on remand, BLM is directed to inform the State of exactly which transactions it believes show that GLO had "accepted" any of the forest lieu applications under Category I, presently classified as Supplement B or C, and permit the State the opportunity to show either

that the portion of the deed referenced under the Category I claim was not accepted, or that it subsequently acquired all interest the offeror may have had prior to the initiation of the Siuslaw National Forest exchange. To the extent that the State is unable to make either of these showings, the base tendered must be deemed to have been improper and the State will be required to substitute valid unused school base for the same.

We turn now to the Category II lands. As noted earlier, these lands involved Supplement A, B, and C lands for which the State never received anything in exchange. In addition, there are 640 acres which were not the subject of the Hyde suit brought by the State. While there are some variations in the arguments of the parties with respect to these lands, much of the controlling law has already been set forth above. We will first examine the Supplement A lands.

[7] The Supplement A lands under Category II involve both lands for which the State subsequently received quitclaim deeds from Hyde as well as those for which it did not. For the purposes of our review, however, this distinction is of no moment. As we noted above, title to the base properties offered in Supplement A vested in the United States and all that the State received from any quitclaim which it obtained from Hyde was the right to either have the selection completed or, after passage of the 1930 Act, to obtain a relinquishment from the United States of the base property. There are no allegations that the State sought to do either. Nor is there any indication that these lieu rights were recorded under the 1955 Act or tendered for payment of the original purchase price, with interest, under the Sisk Act. Thus, any rights which the State may have obtained from Hyde were lost

through its inaction. The Department can recognize no present selection rights emanating from these Supplement A lands. The decision of the State Director rejecting this claim must be affirmed.

The matter of the Supplement B and C lands is somewhat more complex. As we noted above, we are in agreement with the decision of the Oregon Supreme Court in State v. Hyde, supra, that the United States did not receive title to the base lands properly classified as either Supplement B or C. Thus, the State would have been viewed as the legal owner of the land so tendered. However, it seems clear, even assuming that these lands were properly classified, that the United States has treated the 680 acres at issue here as properly part of the public domain for at least 80 years.

We note that here, too, there is considerable doubt over whether this land was properly considered Supplement B or C rather than Supplement A land, the decision of the Oregon Supreme Court notwithstanding. The 1978 audit revision indicated that forest lieu patents issued in response to deeds tendered involving all three relinquishments which make up the 680 acres included within this category. See 1978 Audit, Part 4 at 169. BLM suggests that, to the extent that GLO authorized issuance of patents in response to the applications, GLO must have "accepted" the forest lieu application. Such an acceptance would, necessarily, require that this acreage be treated as Supplement A land rather than Supplement B or C lands.

[8] We need not consider this question further, however, since it is our view that, regardless of whether or not such land is properly considered Supplement A or Supplement B or C lands, the United States has acquired title

to such lands through adverse possession. While it is true that adverse possession will not normally arise against a state, the Court of Claims has recognized an exception insofar as the United States is concerned. In California v. United States, 132 F. Supp. 208 (1955), the Court first noted the general principle that a state is not affected by adverse possession even though it be open and notorious. The Court continued:

> We think this is perhaps a correct statement of the law, but it does not apply as against the United States. The United States may go into possession of the property of a State and may successfully resist an action by the State to eject it. Therefore, if the occupation is by the Federal Government, the State is obliged to take notice of it, and, hence, it follows that if the State learned that any one is occupying its property, it must ascertain, at its peril, whether or not they occupy it for and on behalf of the United States, or under a claim of right acquired from the United States.

Id. at 211.

We think it clear that the United States has openly and notoriously possessed the base lands involved in Supplement B and C of Category II far longer than would be required to vest the Federal Government's title under adverse possession, which in Oregon requires continuous possession for only 10 years. Thus, the title which the United States now possesses is derived not from any exchange proposed by the State or its predecessors-in-interest but by its possession of the base property adversely to the State. There is no statutory authority that would authorize BLM to permit an exchange of land where the offered base is already owned by the United States. Thus, regardless of whether this land properly be considered Supplement B and C land or Supplement A land there is no possible way that BLM could recognize any

selection rights in the State. The decision of BLM as to Supplement B and C land in Category II is affirmed.

The final 640 acres involved in this appeal concern lands which, while part of the Hyde fraud, were not part of the Hyde case before the Oregon Supreme Court. Thus, there has been no determination as to whether this acreage should be classified as Supplement A or B. We note, however, that the United States subsequently issued a patent for 200 acres using part of the tendered land as base. The patent was later cancelled. Insofar as that 200 acres of land is concerned, it is obvious that the United States accepted the deed. Therefore, this acreage is also properly classified as Supplement A, and, for the reasons stated above, no selection rights remain to be exercised. Insofar as the remaining 440 acres is concerned, we think it almost a certainty that GLO accepted the deed for all of the 640 acres, thus placing all of the land in Supplement A. But even were the State able to show that this land was properly considered Supplement B or C, the same considerations relating to adverse possession, just discussed, would compel the rejection of the State's argument concerning this acreage. BLM's decision on this point must likewise be affirmed.

In conclusion, therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Oregon State Office is reversed as to the Supplement A land in Category I, reversed as to that land properly considered Supplement B or C in Category I, affirmed as to the Supplement A land in Category II, affirmed as to the Supplement B or C land in Category II, and the State Office is directed to conduct further proceedings to determine the status of certain

lands presently classified as Supplement B or C in Category I to determine whether such lands are, in fact, correctly classified, in conformity to the principles delineated herein.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

James L. Burski
Administrative Judge